Supreme Court, U.S.
FILED
JUL - 1 2002
OFFICE OF THE CLERK

No. 02-53

In The Supreme Court of the United States

LEATRICE ELLEN CARICOFE,
Personal Representative of the Estate of
Neil Allen Caricofe; RICHARD A. CARICOFE,
Personal Representative of the Estate of
Neil Allen Caricofe,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF OCEAN CITY,
MARYLAND, a body corporate and politic;
ROLAND F. POWELL, Mayor; DAVID MASSEY, Chief;
ERIC ALBAN, Officer;
KATHLEEN BRAEUNINGER, Sergeant;
JENNIFER ENGSTROM, Officer; JAMES GRADY, Officer;
FREDDIE HOWARD, Officer; MATTHEW JONES, Officer;
EDWARD SCHMITT, Officer; MONICA SKARPAC, Officer;
RONNIE TOWNSEND, Officer;
JOHN WHITTINGTON, Sergeant;
EDMOND O'BRIEN, Sergeant;
OCEAN CITY POLICE DEPARTMENT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Benjamin Lipsitz
Counsel of Record
100 Church Lane
Baltimore, MD 21208
(410) 484-3050

Counsel for Petitioners

Gerald C. Ruter
3201 East Joppa Road
Baltimore, MD 21234
(410) 665-9500

Counsel for Petitioners

Edward E. Lulie, III
Harriett E. Lulie
Post Office Box 626
Jefferson, MD 21755
(301) 663-0411

Counsel for Petitioners

COPY

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

QUESTIONS PRESENTED FOR REVIEW

1. In this 42 U.S.C. § 1983 action against Ocean City, Maryland, its mayor, chief of police and officers of its police department premised upon petitioners' claim that the death of their adult son, Neil A. Caricofe, resulted from use of excessive force by Ocean City police officers who encountered him in the seventh floor hallway of the Fenwick Inn, a resort hotel or motel, did not then know his identity or that he was a registered guest at the Inn, saw before them a large, strong looking, naked, unarmed white male who was perspiring profusely, dancing around like a boxer, bumping into the walls and acting bizarrely, found him to be unresponsive to their questions and neither acknowledging their presence nor complying with their commands, decided that he was on drugs of some sort, such as PCP, and sought to seize him for the purpose of obtaining a medical evaluation of his condition, but their attempt to handcuff him initiated a confrontation which progressed back and forth along the hallway, continued down a stairway to the ground floor and spilled out onto an outdoor parking lot, during which as many as thirteen officers ultimately became involved and Neil was repeatedly sprayed with pepper foam and struck by police with clubs and batons, and which finally ended with Neil face down on the parking lot, in police custody, his wrists handcuffed and legs bound, dead, did the officer's conduct, the award of summary judgment in favor of the defendants by the district court after noting it was undisputed that the officers' conduct was in fact the cause of Neil's death, but opining that they were plainly entitled to qualified immunity, and/or affirmance of that award by the court of appeals comport with the Fourth Amendment prohibition of unreasonable seizure, the "objectively reasonable" standard of police conduct contemplated by the qualified immunity doctrine and/or the constraint embodied in Fed.R. Civ.P.

56(c) against granting summary judgment in the presence of any material factual dispute?

2. In light of this Court's decision in *Hope V. Pelzer*, ___ U.S. ___, No. 01309, decided June 27, 2002, should the defense of qualified immunity be precluded at the summary judgment stage of a § 1983 excessive force case alleging violation of the Fourth Amendment right to be free from unreasonable seizure of the person?

3. Does the decision of the court of appeals in the instant case conflict with decisions of the Court of Appeals for the Ninth Circuit as to the parameters of "excessive force" in a § 1983 case premised upon the Fourth Amendment right to be free from unreasonable seizure in which the defense of qualified immunity is asserted?

LIST OF PARTIES

The names of all parties to the proceeding in the United States Court of Appeals for the Fourth Circuit, the court whose judgment is sought to be reviewed, are contained in the caption of the case.

CORPORATE DISCLOSURE

Neither petitioner is a corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES iii

CORPORATE DISCLOSURE iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES viii

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR ALLOWANCE OF THE WRIT 10

1. CERTIORARI SHOULD BE GRANTED BECAUSE POLICE SEEKING TO TAKE AN EMOTIONALLY OR MENTALLY DISTURBED PERSON INTO CUSTODY FOR A MEDICAL EVALUATION SHOULD NOT BE PERMITTED TO DO SO BY USE OF EXCESSIVE FORCE, IN VIOLATION OF THE FOURTH AMENDMENT PROHIBITION OF UNREASONABLE SEIZURE OF THE PERSON 10

2. CERTIORARI SHOULD BE GRANTED BECAUSE THE DISTRICT COURT (a) GRANTED SUMMARY JUDGMENT IN THE PRESENCE OF A GENUINE DISPUTE AS TO A MATERIAL FACT, IN CONTRAVENTION OF FED.R. CIV.P. 56(c), (b) DID SO ON THE BASIS THAT RESPONDENT POLICE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY, A DEFENSE WHICH IN LIGHT OF THIS COURT'S DECISION IN *HOPE V. PELZER*, NO. 01309, SHOULD HAVE BEEN PRECLUDED ON SUMMARY JUDGMENT UNDER THE FACTS OF THIS CASE, AND THE COURT OF APPEALS AFFIRMED 18

(a) Summary judgment was improperly granted in the presence of a material factual dispute 18

(b) In light of this Court's decision in *Hope*, the defense of qualified immunity should be precluded at the summary judgment stage of a § 1983 excessive force case alleging violation of the Fourth Amendment right to be free from unreasonable seizure of the person 23

3. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE FOURTH CIRCUIT IN THE INSTANT CASE CONFLICTS WITH THE DECISION OF THE NINTH CIRCUIT WITH RESPECT TO THE PROPRIETY OF SIMILAR POLICE CONDUCT IN AN ANALOGOUS § 1983 EXCESSIVE FORCE CASE 25

CONCLUSION 27

APPENDIX ..... A-i

TABLE OF AUTHORITIES

Page(s)

Cases:

Deorle v. Rutherford,
272 F.3d 1272 (9th Cir. 2001) 25, 26

Graham v. Connor,
490 U.S. 386, 109 S.Ct. 1865,
104 L.Ed.2d 443 (1989) ..... *passim*

Harlow v. Fitzgerald,
475 U.S. 800, 105 S.Ct. 2727,
736 L.Ed.2d 396 (1983) 13

Headwaters Forest Defense v. County of Humboldt,
276 F.3d 1125 (9th Cir. 2002) 26

Rowland v. City of Raleigh,
41 F.3d 167 (4th Cir. 1994) 12

Saucier v. Katz,
533 U.S. 194, 121 S.Ct. 2151,
150 L.Ed.2d 272 (2001) ..... *passim*

Tennessee v. Garner,
471 U.S. 1, 105 S.Ct. 1694,
85 L.Ed.2d 1 (1985) 10, 11, 24

United States v. Place,
462 U.S. 696, 103 S.Ct. 2637,
77 L.Ed.2d 110 (1983) 11, 24

Zuchel v. City and County of Denver,
997 F.2d 730 (10th Cir. 1990) 19

Constitutional Provisions:

U.S. Const. amend. IV ..... *passim*

U.S. Const. amend. VIII 23, 24

U.S. Const. amend. VIV 18

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 9

28 U.S.C. § 1334(a)(3) 9

42 U.S.C. § 1983 ..... *passim*

Rules:

Fed.R. Civ. P. 56(c) ..... i-ii, 2, 18, 22

OPINIONS AND ORDERS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit in *Leatrice Ellen Caricofe, Personal Representative of the Estate of Neil Allen Caricofe; Richard A. Caricofe, Personal Representative of the Estate of Neil Allen Caricofe v. Mayor and City Council of Ocean City, Maryland, a body corporate and politic; Roland F. Powell, Mayor; David Massey, Chief; Eric Alban, Officer; Kathleen Braeuninger, Sergeant; Jennifer Engstrom, Officer; James Grady, Officer; Freddie Howard, Officer; Matthew Jones, Officer; Edward Schmitt, Officer; Monica Skarpac, Officer; Ronnie Townsend, Officer; John Whittington, Sergeant; Edmond O'Brien, Sergeant; Ocean City Police Department* (No. 01-1809), issued on April 1, 2002, is unpublished, but can be found at 2002 U.S. App. LEXIS 5758. A copy is appended hereto. (App. at 1).

The memorandum opinion of the United States District Court for the District of Maryland (Civil No. S 98-1740), dated May 16, 2001, is not published. A copy is appended hereto. (App. at 11).

The district court's order and judgment dated May 16, 2001, entering final judgment in favor of all remaining[1] defendants, and its order of June 5, 2001 correcting the May 16, 2001 judgment by including therein the pendent state law claims, disposition of which had been omitted from that earlier judgment, are not published. A copy of each is appended hereto. (App. at 17, 19).

---

[1] Two officers who were defendants in the district court, Off. Galloway and Sgt. Hager, were voluntarily dismissed from the case there for reasons not germane to either the district court action or petitioners' appeal to the court of appeals.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 1, 2002. The jurisdiction of this Court to review that judgment is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

U.S. Const., Amend. IV;

42 U.S.C., § 1983; and

Fed.R. Civ.P. 56(c).

Their text is set out in the Appendix hereto. (App. at 21-22).

STATEMENT OF THE CASE

At about 4:30 a.m. on August 23, 1996. Lisa Mulvihill, night auditor at the Fenwick Inn, an Ocean City, Maryland hotel or motel, received a call from a room on the seventh floor that a man was running around nude in the hall. She went to the floor where she saw a large, naked, white male whom she later that morning described to a State's Attorney's investigator as being over six feet tall, weighing about 290 pounds and jumping around and banging himself against the walls. When she tried to talk to him he did not answer or speak at all. She returned to the first floor lobby and called the Ocean City police. While waiting for them to appear she had another call from the seventh floor advising that a naked man was banging on room doors. She again called the police, asked that officers meet her on the seventh floor and returned there, where she observed the same man acting in the same manner. She tried

again to talk to him, but elicited no response. (JA 609).[2] She did not then know the man's identity, but later learned his name was Neil Caricofe and he was a registered guest. (JA 318).

A single officer, Off. Freddie Howard, responded to her calls, arriving at about 4:32 a.m. He saw Neil who, he later said, was

> "naked, looked sweaty, he was aggressively jumping up and down, bouncing on his tippy toes as a boxer would and looked a little like he was swinging - he was winding his arms up as if he was stretching; he was rolling his neck - or rolling his head around as he was stretching his neck."

(JA 115, 636). He thought the man was on drugs (JA 128) and required some kind of assistance. (JA 134).[3]

Because the man "appeared very strung out" (JA 128) and was so large, Off. Howard quickly called for backup. (JA 127, 128, 139). He then asked the man for his name and room number, but received no reply, although, he later said, the man "appeared to be mumbling something" (JA 131, 637) that he (Off. Howard) could not make out. (JA 637). The man, according to Off. Howard, "periodically bounced against the walls; shoulder, head bounced against the wall and continued to do so, again, that same cycle" (JA

---

[2] The reference is to the Joint Appendix in petitioners' appeal to the Fourth Circuit. (Record No. 01-1809).

[3] All statements of a party or witness quoted or referred to in this petition are from his or her deposition testimony during discovery in the district court or from exhibits filed by the respective parties in support of or in opposition to defendants' motions for summary judgment.

127, 638), "like he was strung out on some kind of drug or something" (JA 127), "like he'd lose his balance and bump up against the wall and then start doing the same thing again." (JA 127-128).

At about 4:44 a.m. (JA 332-333, 631) Acting Sgt. Kathleen Braeuninger, a temporary supervisor (JA 135), and Off. Matthew Jones arrived. (JA 135, 456). They had spoken in the front lobby with Ms. Mulvihill who advised them that the male subject was acting weirdly and like he was on drugs. (JA 618, 634). They saw Off. Howard with Neil, who was jumping up and down in an area at the north end of the hallway, sometimes stumbling against the walls and occasionally mumbling incoherently. (JA 631). Sometimes his eyes were shut and when they were open had a vacant look. (JA 631).

Off. Eric Alban arrived shortly thereafter, bringing with him a "Violent Person Restraining Device" (VPRD) (JA 632) (a rope device for restraining a prisoner's legs).

Neil did not take any action against any person, or physically harm anyone, prior to arrival of the police, or initiate any action against them after they appeared. He simply continued to repeat the bizarre pattern of cyclic activities that Off. Howard was the first officer to observe.

The officers finally succeeded in eliciting from Neil his name (JA 631) and that he was staying at the Inn, but he did not respond to other questions, even when the officers said they were there to help him. (JA 632). From her observation of Neil Sgt. Braeuninger, the ranking officer then present, formed the opinion, before any of the officers had touched Neil, that they should get him under control, get handcuffs on him and "then I'd call an ambulance to see if he needed medical assistance for this - I didn't know if it was a drug overdose or drug episode he was having." (JA

620). She did not see the situation as a criminal violation, but as a possible medical emergency. (JA 620-621). She said her "priority at the time was to see that an ambulance was called and if he needed any assistance as far as that goes. The other would have been dealt with later." (JA 621).[4] She thought that Neil possibly appeared to be mentally unstable (JA 621-622) and agreed at her deposition that "from the time this started until the time it ended [she was] treating it as an emergency, a potential medical situation which required intervention." (JA 630).

When their spoken and shouted commands that Neil kneel, or lie down on his stomach (JA 461-462, 466, 623), so that they could handcuff him did not produce a desired result[5], the four officers then sprayed him with pepper foam (oleoresin capsicum or "OC") directed at his face and eyes, (JA 340, 632). That seemed to agitate him, but to have no other effect. (JA 632). When Off. Alban and Sgt. Braeuninger sprayed him again (JA 340, 632) he began to move away from the officers, towards the opposite end of the hallway, followed by the officers. (JA 346-348).

Offs. Alban, Howard and Jones then began repeatedly striking Neil with PR-24s[6], batons and a flashlight. (JA 472). According to the officers, all of their blows were directed against Neil's arms, legs and lower

---

[4] She was referring to criminal violations that might have been implicated, which she identified as disorderly conduct and indecent exposure. (JA 621-622).

[5] At one time, when he knelt, as single cuff from separate sets of handcuffs was placed on each of Neil's wrists (JA 135, 465), but because of his size the officers could not bring the two sets together.

[6] The PR-24 is a wooden club-like weapon designed for defense and crowd control. (JA 117-118).

torso and did not appear to faze him. He continued moving to the south end of the hallway. When Off. Alban struck him several more times he began "wallowing around" (JA 641), then started back toward the north end of the hallway with the officers trailing him and repeatedly yelling commands. (JA 643-644). Sgt. Braeuninger called for more assistance. (JA 626).

Ms. Mulvihill, who had again returned to the seventh floor, was watching. (JA 609). She was standing near a stairwell located about midway of the hallway's length. (JA 151). According to police, Neil then entered an alcove on the side of the hallway across from where Ms Mulvihill was standing, and violently struck his head against a Coca Cola vending machine located there. (JA 507-508, 678). In her August 23, 2996 statement to the State's Attorney's investigator (JA 609) she made no mention of such an occurrence, but said that Neil and the officers "ran back and forth in the hall and struggled" and that Neil "was bleeding from his face." (JA 609).[7] She held open the door to the stairway by which she was standing as Neil and the officers went by her and down the stairs. (JA 609). She did not report being in fear or screaming. (JA 609). When Neil ran by her Off. Jones got in front of him and struck him on a shin with a baton. (JA 479-480).

Neil descended the stairway, with all of the officers in pursuit. (JA 479). Off. Alban pointed to an exit door at the foot of the stairway and Neil left the building with the officers following him onto one of the Inn's parking lots. (JA 556, 678). There officers, including Off. Alban, tried to tackle him, but failed, and Neil began to move around the

---

[7] At 6:51 a.m. on August 23, 1996, Detective James Yost of the Worcester County Bureau of Investigation found evidence of a blood trial where Neil had entered the stairwell (JA 634), but did not report finding any evidence of blood in the vending machine alcove or damage to any of the machines.

lot. (JA 509, 769). In response to a signal 13 (officer in need of assistance) (JA 27) that had been sent out earlier by Off. Alban (using Sgt. Braeuninger's lapel radio without her permission (JA 627)), other officers, including Offs. Monica Skarpac (JA 655-657), James Grady (JA 178), Daniel Galloway (JA 197), Ronald Townsend (JA 275) and Jennifer Engstrom (JA 437), Sgt. James O'Brien (JA 231) and Sgt. John Whittington (JA 386-387), arrived. When Neil did not respond to commands yelled at him, the police continued their striking, spraying, kicking, tackling and jumping on him. (JA 679). He ran or was pushed into parked cars. (JA 634). He continued to act bizarrely. (JA 426).

When Off. Townsend arrived he found Neil on his hands and knees being forced down by a number of officers. (JA 281, 283). Off. Townsend bent down and discharged a can of pepper foam directly into Neil's face. (JA 282-284, 660, 662). Neil suddenly stood up, despite the weight and force of all the officers holding him down. (JA 287). Off. Townsend then struck him repeatedly with his PR-24. (JA 291-292, 302). Off. Skarpac also struck Neil on the backs of his legs and kicked the backs of his knees, trying to buckle his legs, but failed to bring him down. (JA 413, 415, 418).

After Neil continued to move around for a short time, the officers, at the direction of Sgt. Whittington, all jumped on him at once and forced him to the ground, face down. (JA 231, 387, 398, 429). Sgt. O'Brien and other officers stood or knelt on his back. (JA 231, 248). Offs. Skarpac and Engstrom attached a VPRD to his legs. Off. Schmitt assisted in bringing Neil's arms behind his back so that handcuffing him could be completed. (JA 268-269). According to officers, after he was so secured Neil was grunting and coughing and was heard to make "several coughing and wheezing sounds". (JA 678). All of the police except Off. Engstrom then moved away from Neil (JA 241, 423) to confer. She remained with him, holding a rope

which was part of the VPRD binding his legs, but because of his nakedness turned her head away and did not look at him. (JA 668). When emergency medical personnel, who were called at 5:02 a.m., arrived, at 5:06 a.m., Neil had stopped breathing and was dead.

When autopsied at 12:45 p.m. on August 23, 1996, Neil's body measured 6'3" in height and weighed 262 pounds. (JA 520-521). At least three and one-half single spaced pages (JA 521-525) of the autopsy protocol were devoted solely to listing and describing the large number of external injuries to Neil's head, neck, torso, upper and lower extremities, including "a ¾ "laceration to the top of the head in the midline" (JA 521) (which also was shown in a postmortem photograph (JA 640) of the area involved). The autopsy pathologist reported the cause of death as being "multiple drug use & ateriosclerotic cardiovascular disease" (JA 520) and from options offered as to the nature of the death selected "Undetermined". (JA 520). None of the substances found in Neil's blood or body were illegal drugs. One was alcohol and three were drugs used by "body builders" (JA 528) like Neil, who formerly had been a professional wrestler. (JA 528).

The summary judgment record includes an affidavit filed by the Caricofes from Dr. Jay Dix, an expert forensic pathologist who opined, in part, that Neil "died as a result of the actions taken by the defendant police officers in this case . . . [and] that the wound to the top of Mr. Caricofe's head is consistent with Mr. Caricofe having been struck with an object." (JA 610). The Caricofes also filed in support of their opposition to the motions for summary judgment an affidavit (JA 563-572), from James J. Fyfe, Ph.D., then a professor of criminal justice at Temple University and recognized as an expert on police custom and practice throughout the United States (JA 563-564), who opined in part that the conduct of the police officers with respect to

Neil, including their forcible attempt to take him into custody, was the consequence of insufficient training and supervision and constituted "gross violations of the generally accepted police standards throughout the United States." (JA 570-571). He also stated in part that, although he was not purporting to act as a fact finder, he would, if asked, testify that "any police officer who struck Mr. Caricofe in the head with an object during the incident precipitating this suit would have violated generally accepted police standards for use of force." (JA 568).

In his memorandum opinion, the district court judge wrote in part, with respect to Dr. Dix's opinion that Neil had died as a result of the actions of the defendant police officers, that "it is not disputed that the officers' conduct was the cause-in-fact of his death, so that this evidence is hardly determinative" (App. at 14), and went on to conclude that "the officers here are plainly entitled to qualified immunity." (App. at 16).

The court of appeals affirmed, stating in part in its opinion that "we cannot conclude that the police officers acted unreasonably" (App. at 9) and that "the police officers did not violate Caricofe's constitutional rights". (App. at 10).

Jurisdiction of this civil action brought under 42 U.S.C. § 1983 and alleging claims for violation of the Fourth Amendment by police use of excessive force in seizing petitioners' decedent, together with related surviving state law based claims, was conferred upon the court of first instance, the United States District Court for the District of Maryland, where the facts involved arose, by 28 U.S.C. §§ 1331 and 1334(a)(3) and (with respect to state law based claims) by the doctrine of pendent jurisdiction.

REASONS FOR ALLOWANCE OF THE WRIT

1. CERTIORARI SHOULD BE GRANTED BECAUSE POLICE SEEKING TO TAKE AN EMOTIONALLY OR MENTALLY DISTURBED PERSON INTO CUSTODY FOR A MEDICAL EVALUATION SHOULD NOT BE PERMITTED TO DO SO BY USE OF EXCESSIVE FORCE, IN VIOLATION OF THE FOURTH AMENDMENT PROHIBITION OF UNREASONABLE SEIZURE OF THE PERSON.

Police use of force to take custody or control of a person is subject to the Fourth Amendment stricture against unreasonable seizures and is measured against an objective reasonableness standard which implicates factors such as giving "careful attention to the facts and circumstances of each case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others and whether he is actively resisting arrest" *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). *See also Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). As this Court held in *Graham*,

> ". . . *all* claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . ."

(109 S.Ct. at 1871), and

> "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of "'the nature

> and quality of the intrusion on the individual's Fourth Amendment interests'" against the countervailing government interests at stake."

(*Id.*, quoting *Garner*, 471 U.S. at 8, 105 S.Ct. at 1699, quoting *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983)).

In an excessive force case in which a qualified immunity defense is raised, the threshold question still is whether, when taken in the light most favorable to the plaintiff, the facts alleged, or available from the parties' submissions, show that police conduct violated a constitutional right. *Graham* "clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness". *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001). While the *Graham* factors may not be enough, standing alone, to establish that force employed was excessive, the holdings of *Graham* certainly support petitioners' position that when the police came upon Neil on August 23, 1996 in the motel hallway he enjoyed a Fourth Amendment right to be free from an unreasonable seizure, *i.e.*, one which, if accomplished by means of excessive force, would constitute a constitutional violation. *Saucier*, 121 S.Ct. at 2156. There is no doubt that a quite significant level of force was applied to Neil by police. At least three and one-half closely typed, single spaced pages of the autopsy protocol were needed to list and describe the injuries observed on the exterior of Neil's body (*ante* at 8) and some areas were so badly beaten that the cumulative effects of multiple blows made identification of individual strikes difficult or impossible. One could, however, readily conclude that Neil had undergone a massive beating.

Saucier sets out a two part procedure for courts to follow in a § 1983 excessive force case in which the qualified immunity defense is asserted. The court must first determine whether "the facts *alleged* show the officer's conduct violated a constitutional right". (121 S.Ct. at 2156; emphasis added). Petitioners' complaint (JA 9-27) in the district court alleged in part that when Neil, who was confused, disoriented and unable to respond meaningfully to the officers' inquiries, sought to retreat from them he was pepper sprayed, beaten and otherwise unduly subjected to excessive and unnecessary force by all four officers then present, and thereafter by all of the defendant officers. The extensive testimony of the officers at their discovery depositions amply illustrate the nature and extent of the treatment Neil received from the police, despite that they were well aware he was acting in a far less than rational manner, thought he was on drugs and sought to take custody of him only in order to have him evaluated medically. Those averments of the complaint should, petitioners submit, suffice to "show the officer's conduct violated a constitutional right" within the meaning of the first *Saucier* procedural requirement (as should also, separately, the officers' deposition testimony and the autopsy report).

The next sequential step in the *Saucier* procedure, determining if any violation of a constitutional right which "could be made out on a favorable view of the parties submissions" (121 U.S. at 2156) was clearly established was not pursued by either of the courts below since each concluded that no such violation had occurred.[8] Nor, even aside from the "clearly established" aspect, does satisfaction

---

[8] Petitioners contended in the court of appeals that Neil's right to be free from unreasonable seizure was clearly established, in part by a Fourth Circuit case, *Rowland v. City of Raleigh*, 41 F.3d 167 (4th Cir. 1994).

of the first prong of the *Saucier* procedural dichotomy conclude the excessive force inquiry.

In *Saucier*, this Court, because of the limited nature of its grant of certiorari ("only to determine if qualified immunity was appropriate" (121 S.Ct. at 2159)), assumed that "a constitutional violation could have occurred under the facts alleged based simply on the general rule prohibiting excessive force" (*id.*), *i.e.* the rule in that regard espoused in *Graham*, but seemed to add an overlay, stating that "[t]he same analysis is applicable in excessive force cases, where in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable" and that "[t]he question is what the officer reasonably understood his powers and responsibilities to be, when he acted under clearly established standards." (*Id.*)[9]

Hence, *Saucier* directs, it is necessary, in order "to protect officers from the sometimes hazy border between excessive and acceptable force" (121 S.Ct. at 2158), to determine if, in using excessive force, an officer made a "reasonable mistake" (*id.*), or "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." (121 S.Ct. at 2156).

Petitioners respectfully submit that, if examined in light of the Fourth Amendment's prohibition of unreasonable seizure and the requirements of *Graham* and *Saucier*, the force employed against Neil was in fact and in law grossly excessive. The record plainly discloses that when encountered by the police in the hallway he was

---

[9] Petitioners respectfully suggest that the latter statement may be taken as a harking back to pre-*Harlow* criteria. (*Harlow v. Fitzgerald*, 475 U.S. 800, 105 S.Ct. 2727, 736 L.Ed.2d 396 (1983).

patently "out of it"[10], as was apparent to the police, who quickly decided he was under the influence of some sort of drug and that he needed to have a medical evaluation rather than to be arrested. His bizarre conduct was indicative of mental or emotional disturbance. He was naked, sweating profusely (one officer described him as being totally wet), unresponsive, uncomprehending, gave no indication that he was aware of his surroundings, or the presence of the police. He had difficulty keeping his balance. He engaged in no physical activities except periodically repeatedly, almost cyclically, bouncing around on his tip toes, "shadow boxing" and sometimes stumbling and bumping into the walls. He was unarmed. The only other person then in the hallway was Ms. Mulvihill, the Inn's night clerk. Neil was big and looked strong, but had not threatened, attacked, assaulted, laid hands on or offered any violence against her or anyone else, nor did the police have any information that he had attempted to do so.

When the officers appeared he did not seem to be aware of their presence. He did not respond to their requests for information or comply with their commands. He did not attempt to flee. In fact he did not even try to move from the immediate area where the first four officers confronted him until after they initiated their pain compliance methods (pepper spraying him and beating him with batons). Nor did he do anything that posed any immediate threat to the officers' safety. When he proceeded to the other end of the hallway, it likely was in an understandable effort at self-preservation and avoidance of further pain. He did not initiate any physical contact with the police, which began only when they attempted to handcuff him, and his subsequent reactions were typically defensive, rather than aggressive. Any crimes that might

---

[10] Ms. Mulvihill described Neil's condition in those words, according to the report of her interview with Special Investigator Mayne at 8:33 a.m. on August 23, 1996.

have been at issue when the police arrived (indecent exposure or disturbing the peace) were minor misdemeanors. The police had no information that Neil was a felon or a wanted fugitive (and he was, in fact, neither), nor any information or indication of other exigent circumstances that might warrant or necessitate use of force of the nature and amount that was deployed against Neil.

Most importantly, petitioners submit, the police quickly had, appropriately petitioners believe, decided that Neil needed to be taken for a medical evaluation because of his condition rather than arrested for any criminal conduct. However, they did not contain him in the area in which he was standing[11] and which he showed no indication of leaving or attempting to leave, while they summoned a team of emergency medical technicians, or other competent medical assistance, to deal with Neil. As far as the record discloses they did not even radio a superior for advice as to other available alternatives, techniques or procedures before they undertook to use physical force against Neil, starting with their trying to handcuff him. Their lack of success in that endeavor led to a melee in which any meaningful control by the officer in charge was lost or abandoned and which the district court judge found to be "the cause-in-fact" (App. at 14) of Neil's needless death.

Even without regard to whether the force employed by the police was (as the district judge labeled their "conduct") "the cause-in-fact" (App. at 14) of Neil's death, or was lethal or non-lethal, the nature and quality of the physical intrusion by police on Neil's Fourth Amendment interest, his right to be free from unreasonable seizure, are

---

[11] Four officers were then on the scene and available for that purpose and the police had radios which would have enabled them to call for more help, if needed, to contain Neil while they awaited medical assistance.

relatively readily identified since, as this Court noted in *Graham* (109 S.Ct. at 1871), the Fourth Amendment "provides an explicit textual source of constitutional protection against the sort of physically intrusive government conduct".[12] And an individual's fundamental interest in his own physical welfare and well being (especially, as happened here, in his own life) should not need explanation or justification.

Opposing those interests was the governmental interest in effective law enforcement, which in the instant case entailed securing custody of a clearly mentally or emotionally troubled or disturbed man, who was acting in a manner that could, at most, amount to the relatively minor misdemeanors of indecent exposure or disturbance of the peace, who was unarmed, who was not an immediate danger to the police or anyone else, who initiated no aggressive action against the police or anyone else, who made no attempt to flee or escape, and who, the police determined from their own observations of him, needed to be secured, not to arrest him, but so that he could be medically evaluated because of his condition and peculiar behavior. Yet the police ignored recognized procedures for dealing with such a person in circumstance like those with which they then were confronted and instead embarked upon and blindly followed a continuum of force policy until they reached the level of seeking to compel compliance by continued infliction of physical pain (in part by use of pepper spray, strikes with batons and PR-24s), during the course of which Neil died. The degree of force deployed against him was neither necessary, warranted, or justified by anything Neil did or by any governmental interest at

---

[12] The sort of conduct referred to is, as stated in the immediately preceding sentence of the opinion, the use by law enforcement officers of "excessive force - deadly or not - in the course of an arrest, investigatory stop, or other seizure of a free citizen". (109 S.Ct. 1871).

stake. And the fact that the police made no effort whatsoever to obtain medical assistance (which apparently was readily available in the form of emergency medical technicians who, when finally called, after Neil was lying face down on the parking lot dead or dying, arrived at the scene within minutes, is inexcusable. (Indeed, should this case ever be returned to life, petitioners could properly argue that if the police had discontinued their effort to compel compliance by force and had instead sought the medical assistance, obtention of which was the very purpose of the seizure they sought to accomplish, the use of escalating force and the irretrievable loss of Neil's life likely could have been avoided.)

Nor does the instant case present circumstances that required any split second decision making by the police. Neil was neither coming after them or going anywhere. They had ample time and opportunity to observe and study him and his conduct. They made a considered decision that he needed medical evaluation and had whatever time was required to obtain trained personnel to accomplish or assist them in implementing that objective before they took forceful action such as attempting to handcuff Neil. Instead they immediately embarked upon a forceful attempt to physically restrain him which exacerbated the situation and precipitated the debacle that followed. There is in the record no claim or evidence that the police conduct in issue was attributable to any "mistaken belief" (*Saucier*, 121 S.Ct. at 2158) on the part of the officers. Nor does it matter, whether the force was lethal or less than lethal. The issue is whether force used was excessive and use of excessive non-lethal force is just as firmly prohibited by the Fourth Amendment as is excessive use of lethal force.

Petitioners submit that, taken in the light most favorable to them, as must be done both in a summary judgment context and in determining entitlement to

qualified immunity, the facts of record in the instant case plainly show that, in seeking to take control of Neil for the purpose of having him medically evaluated, the police officer respondents improperly used grossly excessive force, in violation of Neil's clearly established Fourth Amendment right to be free from unreasonable seizure.

2. CERTIORARI SHOULD BE GRANTED BECAUSE THE DISTRICT COURT (a) GRANTED SUMMARY JUDGMENT IN THE PRESENCE OF A GENUINE DISPUTE AS TO A MATERIAL FACT, IN CONTRAVENTION OF FED.R. CIV. P. 56(c), (b) DID SO ON THE BASIS THAT RESPONDENT POLICE OFFICERS WERE ENTITLED TO QUALIFIED IMMUNITY, A DEFENSE WHICH IN LIGHT OF THIS COURT'S DECISION IN *HOPE V. PELZER*, NO. 01309, SHOULD HAVE BEEN PRECLUDED ON SUMMARY JUDGMENT UNDER THE FACTS OF THIS CASE, AND THE COURT OF APPEALS AFFIRMED.

(a) Summary judgment was improperly granted in the presence of a material factual dispute.

When the record in a civil action discloses the existence of a genuine dispute as to a material fact a district court ordinarily is precluded from granting summary judgment. Fed.R. Civ. P. 56(c). At least one such dispute appears from the record in the instant case with respect to whether the force used against Neil was excessive, an issue patently material to determining if police conduct was objectively reasonable. In that regard, the district court record includes an affidavit (JA 563-572) (with exhibits (JA573-610)) of James J. Fyfe, Ph.D., made on April 30, 2001. Dr. Fyfe, then professor of criminal justice at Temple University, Philadelphia, Pennsylvania, and a recognized

expert in police matters,[13] was petitioners' expert on police custom and practice throughout the United States. He opined in part that, Sgt. Braeuninger having immediately recognized that Neil was a mentally unstable, emotionally disturbed person, should have followed prevailing police standards for dealing with such persons by obtaining sufficient police assistance to contain Neil and summoning medical assistance before undertaking any forceful confrontation with him (JA 563-568). The same standards imposed a duty upon police to subdue violent persons without unnecessarily or unreasonably endangering life. (JA 564). Those standards were not followed. The police instead at once forcefully attempted, unsuccessfully, to seize Neil and handcuff him, setting in motion the escalation of force applied by the police which then ensued and which ended with Neil's death. Dr. Fyfe also stated in part:

> "It is my opinion that any reasonable and competent officer or supervisor would recognize that such a forceful attempt to take Mr. Caricofe into custody was inappropriate and likely to needlessly escalate this situation to the point where Mr. Caricofe, and perhaps others, would be seriously hurt or killed. Despite the disruption Mr. Caricofe caused, he had not attacked or injured anybody before the police put hands on him. Further, there was no indication in this case that following the prevailing and generally accepted police protocols for encounters with emotionally disturbed persons would have endangered any people or property."

(JA 568).

---

[13] *See Zuchel v. City and County of Denver*, 997 F.2d 730 (10th Cir. 1990).

The district court record also contained the affidavit dated April 25, 2001 of Dr. Jay Dix, a forensic pathologist, filed by petitioners in the district court. Dr. Dix stated he had reviewed the pertinent records in the instant case to determine the cause of Neil's death and opined that Neil died "as a result of the actions taken by the defendant police officers in this case. I further am of the opinion that the wound to the top of Mr. Caricofe [*sic*] head is consistent with Mr. Caricofe having been struck by an object." He based his opinion on his "examination of all the discovery materials already provided to the defendants in this case." (JA 610).

In "A Scale of Escalating Force" appended as an exhibit to his affidavit, Dr. Fyfe includes "head strikes" among examples of "Deadly Force", the highest level of police response shown in the Scale, and which is to be used only in response to a "Subject's Provocation" of "Lethal Assault". (JA 608).

In his affidavit Dr. Fyfe also stated in part that he had read Dr. Dix's affidavit, found his conclusion that Neil's head wound "was consistent with a blow from an object" (JA 568), that his (Dr. Dix's) conclusion to be consistent with a statement from the Fenwick Inn's desk clerk Lisa Mulvihill that police officers struck Caricofe (JA 568), noted that "[t]he Officer Defendants make no mention of striking Mr. Caricofe on the head, but instead indicate that he struck his head against a soda machine" (JA 568), and stated that "[i]f asked, however, I would testify that any police officer who struck Mr. Caricofe in the head with an object during the incident precipitating this suit would have violated generally accepted police standards for use of force." (JA 568).

A Worcester County State's Attorney's Office investigator who interviewed Ms. Mulvihill on August 23,

1996 at 8:33 a.m. wrote, in part, in his "Report of Interview" (JA 609), that Ms. Mulvihill stated in part that when she returned to the seventh floor (after her second call to the police) she:

> "observed the same naked man jumping around and banging into walls. She again tried to talk to the W/M with the same results.
>
> "After a short while ('minutes'), a short Black Male Police Officer arrived. This officer told the W/M to stop. This W/M was unresponsive to the Officer, he called for backup. In a few minute a W/M Officer and a W/F Officer arrived. All of the Officers were yelling at the W/M to get down, he ignored the Officers. Another W/M Officer arrived (total of four now). The last Officer to arrive got his mace spray out an [*sic*] prepared to use it. The B/M Officer called the W/M male 'Neil'. MULVIHILL does not know why the B/M Officer called the W/M Neil. The W/M finally went down to his knees. The Officers yelled at him to go all the way down on his belly, he refused and yelled 'Thank you. Thank you.' MULVIHILL stated that at this point the W/M appeared 'Out of it.' While the W/M was on his knees, one of the Officers, MULVIHILL does not remember which one, attempted to handcuff the W/M. The W/M broke away and got up; all four Officer [*sic*] sprayed him with mace. The W/M ran down the hall and the Officers pursued. MULVIHILL stated that the officer appeared to strike the white male, although she could not tell with what, if anything;

(MULVIHILL was at the far end of the hall.) The Officers were trying to get the W/M to go down. The W/M and the Officers ran back and forth in the hall and struggled. The W/M was bleeding from his face. MULVIHILL opened a stair door to leave the floor, and the W/M dashed through the door and down the steps with the Officers in pursuit. MULVIHILL took the elevator down to the lobby and did not see the W/M again."

Offs. Howard (JA 158), Jones (JA 477) and Alban (JA 508) testified at depositions that they saw Neil hitting his head on a soda machine or other object in the alcove. Detective Yost of the Worcester County Bureau of Investigation arrived at the Inn at 6:51 a.m. on August 23, 1996. During his investigation he found evidence of a blood trial where Neil had entered the stairwell (JA 634), but did not report finding any blood evidence in the vending machine alcove or damage to any machine. (JA 634).

The conflicting versions as to whether the cut on the top of Neil's head resulted from a blow delivered by police or was self-inflicted by Neil's hitting his head on a soda machine, together with Ms. Mulvihill's statement, the autopsy report and the opinions of Dr. Fyfe and Dr. Dix all raised genuine disputes as to material factual issues regarding excessiveness *vel non* of the force used on Neil by the police.

Petitioners respectfully submit that resolution of such issues by the district judge in a summary judgment context violated Fed.R. Civ. P. 56(c) and affirmance thereof by the court of appeals amounted to a departure from the accepted and usual course of summary judgment

proceedings calling for an exercise of this Court's supervisory power.

(b) In light of this Court's decision in *Hope*, the defense of qualified immunity should be precluded at the summary judgment stage of a § 1983 excessive force case alleging violation of the Fourth Amendment right to be free from unreasonable seizure of the person.

On June 27, 2002, this Court decided *Hope*. In that case Hope, the petitioner, was an Alabama prison inmate who twice was handcuffed to a "hitching post" because of his disruptive conduct. On the second occasion, he was handcuffed, with his hands above his shoulders, for seven hours, in the hot sun, without a shirt. He was given water only once or twice, but no bathroom breaks. He was taunted about his thirst by a guard who allegedly gave water to some dogs, then brought the water cooler closer to Hope and kicked it over, spilling the water on the ground. Hope brought a § 1983 action, alleging cruel and unusual punishment prohibited by the Eighth Amendment in the U.S. District Court for the Northern District of Alabama against some of the guards who had been involved. A magistrate judge treated responsive affidavits filed by the defendants as a motion for summary judgment and, without deciding whether attaching him to the hitching post as a form of punishment violated the Eighth Amendment, decided the guards were entitled to qualified immunity. The district court entered judgment accordingly. The Eleventh Circuit, after finding that use of the hitching post violated the Eighth Amendment, affirmed, relying on circuit precedent regarding qualified immunity which required that the federal law against which official conduct was to be evaluated must be established by cases materially similar to the case that was before the court, and that Hope's two

precedents, though analogous, did not meet that requirement. This Court granted certiorari to review the qualified immunity holding, stated in part, that the critical issue was whether the guards had been given fair warning that their alleged treatment of Hope was unconstitutional, decided that Hope's precedents were sufficient to afford such notice and that the defense of qualified immunity hence was precluded at the summary judgment stage.

The essence of *Hope* appears to be that if the "clearly established" prong of the two-part qualified immunity doctrine, as recently analyzed in *Saucier*, is met in a summary judgment context by the record then before the summary judgment court, qualified immunity is no longer an available defense at that stage and the highly fact specific question whether conduct at issue met the objectively reasonable facet of the doctrine is to be left for trial. Petitioners submit that application of that premise to the instant case would compel the same result.

While *Hope* is an Eighth Amendment case and petitioners' instant case is premised on a Fourth Amendment right, that distinction does not seem to be significant. The *Hope* opinion, for instance, cites to *Saucier*, a Fourth Amendment case, with respect to the nature and effect of and procedure in a qualified immunity case.

As *Place*, *Garner*, and *Graham* make clear, determining the reasonableness *vel non* under a Fourth Amendment standard of the force used in particular circumstances requires a factually oriented, careful balancing of competing interests, which potentially present unlimited factual variations, and necessitates an in depth factual analysis not amenable to precise definition nor mechanical application. That task, as *Hope* seems to recognize, is best left to a full factual inquiry not available on a motion for summary judgment. When, as in the instant

excessive force case, a clearly established constitutional right could have been violated on a favorable view of the allegations made by a plaintiff, the remaining inquiry ought properly be left to a fact finder.

3. CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE FOURTH CIRCUIT IN THE INSTANT CASE CONFLICTS WITH THE DECISION OF THE NINTH CIRCUIT WITH RESPECT TO THE PROPRIETY OF SIMILAR POLICE CONDUCT IN AN ANALOGOUS § 1983 EXCESSIVE FORCE CASE.

In *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), the Court of Appeals for the Ninth Circuit held in a § 1983 excessive force case that, for purpose of summary judgment, the use of less than lethal force (shooting Deorle with a "bean bag" round from a 12-guage shotgun, causing loss of his left eye and injuries to his head) while attempting to seize him when, in an extremely emotionally disturbed state he was pacing back and forth on the street in front of his house and acting bizarrely was excessive. The court rejected the shooting officer's qualified immunity defense. While that case is not on all fours with the instant one, there are substantial similarities. At least thirteen officers were at the scene when the shooting occurred. Police road blocks had been set up at each end of the street, to hold back the public and contain Deorle, who had made no effort to leave. He was unarmed. He had not attacked or touched anyone. When he was shot the police were awaiting arrival of a negotiating team specially trained to defuse similar situations with minimal risk to police, the public or the subject. (The shooter, Officer Rutherford, was a member of that team who had preceded it to the site to survey the situation.) Police had been called by Deorle's wife because he was acting so strangely that she thought he might be suicidal. One officer initially responded to the call and Mrs.

Deorle and the children left the house without any interference from Deorle, although he angrily refused to permit the officer to enter the house without a warrant. The shooter, unseen by Deorle, was observing him from a sheltered position, decided that if Deorle, who then was walking toward the shooter at a normal pace, proceeded beyond a point and where he would be able to see the officer, he would be shot. When Deorle went beyond that point he was shot with the less than lethal "bean bag" round.

The Ninth Circuit, at the summary judgment stage, held the police conduct to be excessive and rejected Rutherford's qualified immunity defense. The Fourth Circuit, dealing with circumstances in the instant case which were essentially similar to those in *Deorle*, despite factual differences such as that Deorle was shot with a non-lethal weapon and sustained severe injuries, while Neil was sprayed with pepper spray and severely beaten with police clubs and batons and died, the diametrically opposed effect with respect to the excessive force issue given by the two circuits to significantly similar police conduct creates a conflict that this Court should undertake to resolve. *See also Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125 (9th Cir. 2002), where the Ninth Circuit, on remand in light of *Saucier*, held that pepper spraying non-violent environmental activists protesting logging of ancient redwood trees constituted use of excessive force.

CONCLUSION

For the reasons stated herein, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Benjamin Lipsitz,
Counsel of Record
ATTORNEY AT LAW
100 Church Lane
Baltimore, MD 21208
(410) 484-3050

Gerald C. Ruter,
Edward L. Lulie,
Harriet E. Lulie.

Attorneys for Petitioners

Baltimore, Maryland
June 30, 2002

APPENDIX TABLE OF CONTENTS

Page

Unpublished Opinion of
The Fourth Circuit Court of Appeals
entered April 1, 2002 ..... A-1

Memorandum Opinion of
The Honorable Frederic N. Smalkin
Granting Remaining Defendants' Motions for
Summary Judgment on Qualified Immunity Grounds
entered May 16, 2001 ..... A-11

Order and Judgment of
The Honorable Frederic N. Smalkin
Granting Remaining Defendants' Motions for
Summary Judgment and Entering Judgment in
Their Favor and Against Plaintiffs for Costs
entered May 16, 2001 ..... A-17

Order Correcting Judgment of
The Honorable Frederic N. Smalkin
entered June 5, 2001 ..... A-19

Relevant Constitutional Provision, Statute & Rule A-21

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

LEATRICE ELLEN CARICOFE, Personal Representative of the Estate Of Neil Allen Caricofe; RICHARD A. CARICOFE, Personal Representative of The Estate of Neil Allen Caricofe, Plaintiffs-Appellants	:	
v.	:	No.01-1809
MAYOR AND CITY COUNCIL OF OCEAN CITY, MARYLAND, a body Corporate and politic; ROLAND F. POWELL, Mayor; DAVID MASSEY, Chief; ERIC ALBAN, Officer; KATHLEEN BRAEUNINGER, Sergeant; JENNIFER ENGSTROM, Officer; JAMES GRADY, Officer; FREDDIE HOWARD, Officer; MATTHEW JONES, Officer; EDWARD SCHMITT, Officer; MONICA SKARPAC, Officer; RONNIE TOWNSEND, Officer; JOHN WHITTINGTON,	:	

Sargeant; EDMOND
O'BRIEN, Sergeant; :
OCEAN CITY
POLICE DEPARTMENT, :
Defendants-Appellees

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, Chief District Judge
(CA-98-1740-S)

Argued: February 28, 2002

Entered: April 1, 2002

Before WILKINSON, Chief Judge, and NIEMEYER and MICHAEL, Circuit Judges. *[2]*

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Benjamin Lipsitz, Baltimore, Maryland, for Appellants. Robert Charles Verderaime, VERDERAIME & DUBOIS, P.A., Baltimore, Maryland; Guy Robins Ayres, III, AYRES, JENKINS, GORDY & ALMAND, P.A., Ocean City, Maryland, for Appellees. ON BRIEF: Gerald C. Ruter, LAW OFFICE OF GERALD C. RUTER, Baltimore, Maryland; Edward Lulie, III, Harriet E. Lulie, Jefferson, Maryland, for Appellants.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

OPINION

PER CURIAM:

Neil Caricofe died, apparently from cardiovascular disease and the effects of multiple drugs, after a lengthy altercation with Ocean City, Maryland police, who were attempting to subdue him. Caricofe's parents filed this action, under 42 U.S.C. § 1983 and state law, against the police officers for using excessive force and against their supervisors, the police department, and Ocean City, for in adequate training and supervision. The district court granted summary judgment to the officers on the basis of qualified immunity and to the other defendants on the basis that no constitutional violation was committed by the officers. We affirm.

I

Lisa Mulvihill, the night clerk at the Fenwick Inn in Ocean City, Maryland, received a call from a guest in the early morning *[3]* hours of August 23, 1996, informing her that a large naked man was running around the hallway on the seventh floor. Mulvihill went up to the seventh floor and saw a large naked white male (Neil Caricofe), who she perceived to be over six feet tall and approximately 290 pounds, "jumping around and banging himself against the walls." She attempted to speak to the man, but when he did not answer her or speak at all, she went back down to the first floor lobby and called the Ocean City police. Before the police arrived, Mulvihill received another complaint, this time that a naked man was banging on guestroom doors on the seventh floor. She called police again, asking them to meet her on the seventh floor, and then returned to that floor. When she arrived, Neil Caricofe was jumping and

banging into the walls. She again tried to speak with Caricofe, but he remained unresponsive.

Shortly thereafter, Officer Howard arrived and went directly to the seventh floor, where he saw a naked, sweaty Caricofe in the hallway, "bouncing on his tippy toes as a boxer would" and moving his arms and neck around as if to stretch them. Caricofe also appeared to be extremely strong, seemed like he was "strung out on some kind of drug," and periodically would appear to lose his balance and bump up against the wall. Officer Howard decided that Caricofe needed to be detained before someone got hurt, and he called for backup. While waiting, he attempted to engage Caricofe in conversation, asking him his name, room number, and similar matters, but received no response.

A few minutes later, Acting Sergeant Kathleen Braeuninger and Officer Matthew Jones arrived on the scene. Caricofe was still moving around, bouncing up and down occasionally, clenching his fists, and pounding on the walls. The officers decided to restrain Caricofe so they could figure out why he was acting so strangely. Sergeant Braeuninger continued to ask Caricofe questions and did get him to tell her that his name was Neil, but otherwise Caricofe remained silent and continued moving around the hallway in an aggressive manner, periodically turning to the officers and growling and flexing his muscles.

A short while later, Officer Alban arrived on the scene with a "violent prisoner restraining device," a rope contraption used to bind the *[4]* feet of violent prisoners. The other officers were still talking to Caricofe, trying to get him to lie down, but Caricofe continued running around, jumping up and down, and banging into the walls. All of the officers believed that Caricofe was on some sort of drug, possibly PCP, which can give a person super human strength. In fact, later toxicology reports revealed that

Caricofe had four drugs in his system - ephedrine, gamma hydroxybutrate, anabolic steroids, and ethanol. The first three are drugs commonly used by body builders.

Believing that Caricofe was a danger to himself, the other hotel guests, and themselves, the officers decided that they needed to subdue Caricofe and then call for medical assistance. They began by ordering Caricofe to lie down, but he did not comply. He did eventually, however, stumble against a door and fall to his knees, prompting the officers to use the opportunity to try to restrain him with handcuffs. Officers Howard and Jones approached Caricofe and, each using his own pair of handcuffs, placed a cuff on each wrist and tried to bring the cuffs together behind Caricofe's back. As soon as tension was applied to his arms, however, Caricofe became agitated, threw the officers off of him, stood up, and began swinging his arms violently and twisting and "wallowing around." Thus failing in their attempt to place Caricofe in handcuffs, the officers continued to yell at Caricofe, ordering him to lie down on the floor. Caricofe, however, continued to walk around, swinging his arms and the two sets of handcuff, one set now attached to each wrist.

Sergeant Braeuninger then warned Caricofe that if he did no comply with their demands, they would spray him with pepper spray. When Caricofe did not comply, he was sprayed by all four officers, but the spray did not appear to have any effect on him. Caricofe continued walking around swinging his arms and shaking his head. He began advancing toward Officers Howard and Jones and eventually pinned Officer Howard up against the wall, holding him by his shirt. As Officers Jones and Howard struggled to get Caricofe to release Howard, Sergeant Braeuninger radioed for more help, and Officer Alban, using Braeuninger's collar microphone called in a "Signal 13," indicating an officer was in serious trouble.

The officers then began striking Caricofe with their batons on his buttocks and legs. Caricofe did not, however, go to the floor, but *[5]* rather continued swinging his arms around. He then ran to the end of the hallway and went into the vending machine alcove where "he started violently turning around, thrusting and knocking his shoulders and head against the soda machine very violently." The officers, however, did not go into the vending machine alcove because they felt it was too confined of an area to be a safe place to restrain Caricofe.

Caricofe then came running out of the vending machine area, pushed through the door to the stairway and started down the stairs, despite the fact that Officer Jones was hitting him in the shin with a nightstick and ordering him to stop. The officers followed him down the stairs and Sergeant Braeuninger again radioed for help.

In the parking lot, the officers attempted to tackle Caricofe, but he just bounced off of a car and continued running. Eventually, the officers managed to take Caricofe down to his hands and knees. At this point other officers had arrived on the scene, and Officer Townsend ran over and used pepper foam on Caricofe, which again seemed to have no effect. Caricofe stood up and shed all four officers who were attempting to hold him down. Townsend then dropped his pepper spray and began to use his baton on Caricofe, striking him across his left thigh. When Caricofe did not comply with Townsend's orders to get down, Townsend struck Caricofe a second time. Officers Skarpac and Engstrom had also arrived on the scene, and they joined Officer Townsend in attempting to bring Caricofe down, striking Caricofe with their batons on his lower legs. Caricofe ran away again, and the officers followed.

Officer Alban then tried to "football tackle" Caricofe, but he just bounced off of him. After Alban's ineffective

tackle, Sergeant Whittington grabbed on to Carciofe, several other officers converged on Caricofe, and finally the group was able to take him to the ground. The officers then struggled to handcuff Caricofe and put the "violent prisoner restraining device" on his legs. They held Caricofe down by leaning and kneeling on him because he continued to struggle and resist. Eventually the officers subdued Caricofe, and he stopped moving. After Caricofe stopped moving, Officer Alban confirmed that he was still breathing. But when the paramedics arrived, the officers realized that while they were waiting, Caricofe had stopped breathing. *[6]* They assisted the paramedics in performing CPR, but their resuscitation efforts failed, and Caricofe died.

The autopsy revealed that Caricofe was 6'3" tall and weighed 262 pounds. It confirmed that during the altercation, he had suffered many external injuries to his head, neck, torso, and upper and lower extremities, including a laceration to the top of his head. Most of the injuries, however, were on the legs. The pathologist reported the cause of death as "multiple drug use & arteriosclerotic cardiovascular disease," and the nature of death as "undetermined."

Caricofe's parents, Leatrice and Richard Caricofe, commenced this action under 42 U.S.C. § 1983 and state law against the officers, their supervisors, the police department, and Ocean City, alleging that the police officers had used excessive force in apprehending their son, and that the other defendants had improperly trained and inadequately supervised the officers. On the defendants' motion for summary judgment, the district court entered judgment in favor of all defendants, concluding that the officers were "plainly entitled to qualified immunity" and that, therefore, the plaintiffs had not demonstrated that the other supervisory defendants had violated Caricofe's constitutional rights. This appeal followed.

II

The plaintiffs contend that the officers' use of force was not objectively reasonable, and therefore they were not entitled to qualified immunity. The officers assert that even viewing the facts in the light most favorable to the plaintiffs, their use of force was reasonable. Therefore, they argue, the plaintiffs have failed to demonstrate any constitutional violation.

Public officials are generally granted immunity from lawsuits based on reasonable discretionary acts taken in carrying out their official duties. Because of the need to protect constitutional rights while also avoiding a chilling effect on the conduct of these officers, qualified immunity balances "[t]he public interest in deterrence of unlawful conduct and in compensation of victims," *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), with the public interest in having officials act "with independence and without fear of consequences," *id. [7]* (quoting *Pierson v. Ray*, 386 U.S. 457, 554 (1967)); *see also Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (recognizing that "permitting damages suits against governmental officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties"). "[W]hether an individual official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson*, 483 U.S. at 639 (internal citations omitted) (quoting *Harlow*, 457 U.S. at 818-819).

The analysis in a claim for qualified immunity begins by first considering whether "[t]aken in the light most

favorable to the party asserting the injury . . . the facts alleged show the officer's conduct violated a constitutional right[.]" *Saucier v. Katz*, 121 S.Ct. 2151, 2156 (2001). If this initial question is answered affirmatively, "the next sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case." *Id.* at 396-97.

In this case, we cannot conclude that the police officers acted unreasonably. They were faced with a situation in which a large and exceptionally strong man was acting erratically and violently, placing at risk not only himself, but also the hotel guests and the police officers. The officers necessarily made a split-second judgment that the man needed to be restrained and then proceeded with this effort, escalating their force only when the previous level of force proved *[8]* ineffective. They began by trying simply to handcuff Caricofe. When that did not work - indeed, it resulted in Caricofe pinning one officer against a wall - they tried to subdue him with pepper spray. When the pepper spray failed to subdue Caricofe, they were forced to resort to striking him with their nightsticks in the lower extremities, but deadly forced was never used, nor considered. This sequence of events demonstrates a reasoned and restrained approached, rather than unreasonableness. That Caricofe died after the struggle is most tragic, but it cannot be said that this was from an *unreasonable* conduct on the part of the officers.

Having concluded that the plaintiffs have not demonstrated any constitutional violation, it becomes unnecessary for us to consider whether the rights at issue were clearly established such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 121 S.Ct. at 2156 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). The district court

correctly ruled that the officers were entitled to qualified immunity.

Because the police officers did not violate Caricofe's constitutional rights, the other defendants may not be held liable for failing to train or supervise those officers. *See City of Los Angeles v. Heller*, 475 U.S. 796,, 799 (1986) (holding that a municipality cannot be held liable for an official policy or custom if it has been determined that the individual defendants did not violate the plaintiff's constitutional rights); *Young v. City of Mount Ranier*, 238 F.3d 567, 579 (4th Cir. 2001) ("The law is quite clear in this circuit that a section 1983 failure-to-train claim cannot be maintained against a governmental employer in a case where there is no underlying constitutional violation by the employee."); *Grayson v. Peed*, 195 F.3d 692, 697 (4th Cir. 1999) ("As there are no underlying constitutional violations by any individual, there can be no municipal liability.")

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTICT COURT
FOR THE DISTRICT OF MARYLAND

LEATRICE ELLEN CARICOFE, RICHARD A. CARICOFE, Personal Representatives of the Estate of Neil Allen Caricofe	:	
v.	:	CIVIL NO. S 98-1740
MAYOR AND CITY COUNCIL OF OCEAN CITY, et al.	:	

Entered: May 16, 2001

MEMORANDUM OPINION

This is a cased filed under 42 U.S.C. § 1983, arising from the death of Neil Allen Caricofe, in the course of his being subdued by officers of the Police Department of Ocean City, Maryland. The matter is before the Court on defendants' motions for summary judgment on grounds of qualified immunity, which the plaintiffs oppose. No further briefing or oral hearing is needed. Local Rule 105.6, D. Md.

It is well-settled that qualified immunity defenses are appropriate for disposition of summary judgment - at least where there is no genuine dispute as to the **material** facts connected with the officers' conduct -- and should be settled as early in the proceedings as possible, given that part of the rationale for the use of the qualified immunity defense is the avoidance of an unnecessary trial. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Many Fourth Circuit cases have recognized the principle that summary judgment may, in appropriate cases, be granted on claims of unreasonable

seizure involving the alleged use of excessive force. *[2] Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996). *See also Sigman v. Town of Chapel Hill*, 161 F.3d 782 (4th Cir. 1998

The operative facts are largely undisputed. The case arises from an incident that occurred in the early morning during the summer of 1998 [*sic*], in the resort town of Ocean City, Maryland. At about 4:30 a.m., Ocean City police received a call that there was a naked man banging on various doors on the seventh floor of the Fenwick Inn motel. The first officer to arrive was confronted by quite a sight. It was the decedent, who weighed 262 pounds and was 6'3" tall, stark naked, sweating profusely, flexing up and down on his toes, rolling his head around, losing his balance, and banging up against the walls of the seventh floor hallway. (Although unbeknownst to any of the police officers at the time, it turns out that Mr. Caricofe was a professional wrestler.) While distracting Mr. Caricofe by trying to engage him in conversation (which elicited no response), Officer Howard called for back-up. Three back-up officers arrived within minutes. All of the officers formed the opinion that Mr. Caricofe was probably on some sort of drug, such as PCP. Mr. Caricofe continued pacing the hallway naked and approached the officers, despite being told to get and stay on the ground. At that point, the officers clearly had both the right and the duty, in order to preserve the public peace, to move Mr. Caricofe out of the public area of the motel. *See Karadi v. Jenkins*, ____ F.3d ____, 2001 WL 320893 (4th Cir. April 3, 2001), at p. *[3]* 5 (copy attached). When Mr. Caricofe finally decided to kneel, the officers attempted to control him by placing handcuffs on him. Because of the huge size of Mr. Caricofe's wrists, the officers were unable to close the cuffs. Mr. Caricofe suddenly arose, throwing both officers off of him, and their subsequent attempts to restrain him failed. All of the officers, as Mr. Caricofe continued to approach them, flailing his arms, sprayed him with pepper spray, their next

escalation from muscle-power in their attempts to restrain him. The pepper spray did not work. It simply had the result of making Mr. Caricofe run in the direction of the motel clerk. The officers then escalated to the next level of force, striking Mr. Caricofe with batons on the muscular parts of his back and legs. Once again, this did no good, as Mr. Caricofe simply went into the vending area, where, according to police, he started banging his head against the walls and the machines. (Plaintiffs claim that the police testimony on the head-banging is incorrect, and was given to cover up the fact that a police officer struck plaintiff on the head.) Mr. Caricofe next decided to run down seven flights of stairs, still naked, out onto the parking lot, knocking over an officer in the process. An officer on the parking lot attempted to tackle Mr. Caricofe but was unable to get a grip on him and simply "bounced off" the large, agitated man. A signal 13 call for back-up brought seven more officers onto the scene. All the offices *[sic]* repeatedly attempted to *[4]* get Mr. Caricofe on the ground so they could restrain him. More baton strikes were applied to Mr. Caricofe, but they had no noticeable effect on him.[1]

The officers' next decision was to jump on Mr. Caricofe and bring him to the ground. They did so, affixing a "violent person restraint device" to his legs, thus eventually subduing him. Just after that, Mr. Caricofe was observed grunting and coughing, but then he suddenly stopped breathing. As a result, and resuscitation efforts having failed, he died. The evidence is clear that, after Mr.

---

[1] The plaintiff contends that Mr. Caricofe was struck on the head by a baton, and offers a forensic pathologist's report that "the wound to the top of Mr. Caricofe [*sic*] head is consistent with Mr. Caricofe having been struck by an object." Whether the wound was caused by the Coke machine head-butting or by a baton strike is, however, not material to the disposition of the present motion, as there is not indication that the wound was lethal or represented the application of deadly force.

Caricofe was subdued and ceased struggling, no further force was used on him.

In addition to the evidence of police conduct excerpted above, there is no evidence, offered by plaintiffs, in the form of an opinion of a forensic pathologist, Dr. Dix, that Mr. Caricofe "died as a result of the actions taken by the defendant police officers in this case." Of course, it is not disputed that the officers' conduct was the cause-in-fact of his death, so this evidence is hardly determinative. Also, plaintiffs offer the opinion of Dr. Fyfe, a criminology professor, who claims that his opinions have *[5]* set the standards for police conduct in dealing with emotionally disturbed persons, as set forth in the case of *Zuchel v. City and County of Denver, Colorado*, 997 F.2d 730 (10th Cir. 1993).[2]

Under the circumstances of this case, there is no question but that qualified immunity is available to the officers under Fourth Circuit precedent, as a matter of law. They were faced with a huge, agitated man creating a noisy disturbance in the middle of a summer night at a resort motel, who resisted all reasonable applications of force that were attempted in a humane, escalating order during repeated attempts to bring him under control, for his safety as well as the officers' safety and that of others. A legion of Fourth Circuit cases compels the conclusion that the officers' conduct in this case was objectively reasonable, based on the situation facing them, and entitles them to qualified immunity as a matter of law. For example, in *Young v. City of Mt. Rainer*, 238 F.3d 567 (4th Cir. 2001), the court held that there was no excessive force applied, nor was there any other claim stated for violation of civil rights, where pepper

---

[2] The Court notes that that case dealt with the shooting of an unarmed suspect, involving the use of deadly force. There was no shooting in this case, nor was there any other application of deadly force violative of the established law of this Circuit, as is discussed more fully in the text hereof.

spray had been used to subdue an individual who was high on PCP and who died in confinement from sudden cardiac arrhythmia. Even if the officers were negligent in what they did, the court held, there was no constitutional violation. *Cf., Daniels [6] v. Williams*, 474 U.S. 327 (1986). Even in cases where deadly force has been used, the Fourth Circuit, in circumstances similar to the present one, has repeatedly recognized that the officers on the scene are entitled to have their split-second judgments respected, when it was patently necessary to utilize force to bring an individual under control and to protect officers. *See, e.g., Gooden v. Howard County*, 954 F.2d 960 (4th Cir. 1992)(en banc). *See also Howerton v. Fletcher*, 213 F.3d 171 (4th Cir. 2000). Certainly, it is regrettable that escalating force needed to be used on the plaintiffs' decedent, but there simply was neither time nor opportunity for a detailed psychiatric evaluation or a calm case study to be made before the individual was brought under control. In the circumstances facing them, the Ocean City officers sued here were clearly entitled to use the force they did under the decided case law in this Circuit. *See, e.g., Bates ex rel. Johns v. Chesterfield County*, 216 F.3d 367 (4th Cir. 2000).

Although perhaps well-advised, the actions that plaintiffs' expert claims in hindsight should have been taken by the police - - for example, dispatching more than one officer initially, attempting to negotiate, and abstaining from any use of force - - were not compelled by the Constitution, and the officer's failure to take those actions does not cause them to lose their qualified immunity under the law of this Circuit. *[7]*

Furthermore, as the Supreme Court and the Fourth Circuit have both noted, the calm assessment that can be made in hindsight in a court of law or by an expert is no substitute for the on-the-spot exercise of judgment by a police officer who reasonably could have believed that his

actions were constitutionally permissible. *Anderson v. Creighton*, 483 U.S. 635 (1987); *McLenagan v. Karnes*, 27 F.3d 1002 (4th Cir. 1994). *See also Sigman, supra.* As the court said in *McLenagan* "section 1983 does not purport to redress injuries resulting from reasonable mistakes." *McLenagan*, 27 F.3d at 1008, *quoted with approval in Anderson v. Russell*, ____ F.3d ____, 2001 WL 305064 (4th Cir. March 29, 2001).

Because the officers here are plainly entitled to qualified immunity, there is also no case stated for violation of civil rights under 42 U.S.C. §1983 against the Mayor and City Council of Ocean City, Mayor Powell, Chief Massey, and the Ocean City Police Department. Therefore, summary judgment will be entered in favor of those defendants as well. *Temkin v. Frederick Co. Comm'rs.*, 945 F.2d 716, 723-24 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992). A separate order will be entered accordingly.

/s/
Frederic N. Smalkin
United States District Judge

Dated: May 16th, 2001

IN THE UNITED STATES DISTICT COURT
FOR THE DISTRICT OF MARYLAND

LEATRICE ELLEN CARICOFE, RICHARD A. CARICOFE, Personal Representatives of the Estate of Neil Allen Caricofe	:	
v.	:	CIVIL NO. S 98-1740
MAYOR AND CITY COUNCIL OF OCEAN CITY, et al.	:	

Entered: May 16, 2001

ORDER AND JUDGMENT

For the reasons stated in the foregoing Memorandum Opinion, it is, this 16th day of May, 2001, by the Court, ORDERED AND ADJUDGED:

1. That the remaining defendants' motions for summary judgment BE, and they here ARE, GRANTED;

2. That judgment BE, and it hereby IS, entered in favor of defendants Alban, Braeuninger, Engstrom, Grady, Howard, Jones, Schmitt, Skarpac, Townsend, Whittington, O'Brien, Mayor and City Council of Ocean City, Powell, Massey, and Ocean City Police Department and against the plaintiffs, with costs awarded to the defendants; and

3. That the Clerk of Court mail copies hereof to counsel for the parties.

/s/
Frederic N. Smalkin
United Stated District Judge

IN THE UNITED STATES DISTICT COURT
FOR THE DISTRICT OF MARYLAND

LEATRICE ELLEN CARICOFE, RICHARD A. CARICOFE, Personal Representatives of the Estate of Neil Allen Caricofe	:	
v.	:	CIVIL NO. S 98-1740
MAYOR AND CITY COUNCIL OF OCEAN CITY, et al.	:	

Entered: June 5, 2001

ORDER CORRECTING JUDGMENT

It is by the Court, this, 5th day of June, 2001 ORDERED:

1. That the Order and Judgment dated May 16, 2001, in this case, BE and the same hereby IS, CORRECTED to cure an error arising from oversight or omission, pursuant to Fed. R. Civ. P. 60(a);

2. That the said Order and Judgment BE, and it hereby IS, CORRECTED to include the following language: "It is further ordered and adjudged that all state-law based claims BE, and they hereby ARE, DISMISSED, without prejudice, pursuant to 28 U.S.C. §1367(c)(3); and

3. That the Clerk of the Court mail copies hereof to counsel for the parties.

/s/
Frederic N. Smalkin
United Stated District Judge

RELEVANT CONSTITUTIONAL PROVISION, STATUTE & RULE

US Const Amend. IV - Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, particularly describing the place to be searched, and persons or things to be seized.

42 USCA §1983 - Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

FRCP Rule 56(c) Summary Judgment - Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(2)

Supreme Court, U.S.
FILED
JUL 01 2002
OFFICE OF THE CLERK

No. 02-53

IN THE

Supreme Court of the United States

LEATRICE ELLEN CARICOFE and RICHARD A. CARICOFE, as Personal Representatives of the Estate of Neil Allen Caricofe,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF OCEAN CITY, MARYLAND, ROLAND F. POWELL, Mayor; DAVID MASSEY, Chief; ERIC ALBAN, Officer; KATHLEEN BRAEUNINGER, Sergeant; JENNIFER ENGSTROM, Officer; JAMES GRADY, Officer; FREDDIE HOWARD, Officer; MATTHEW JONES, Officer; EDWARD SCHMITT, Officer; MONICA SKARPAC, Officer; RONNIE TOWNSEND, Officer; JOHN WHITTINGTON, Sergeant; EDMOND O'BRIEN, Sergeant; and OCEAN CITY POLICE DEPARTMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT C. VERDERAIME
Counsel of Record
VERDERAIME & DUBOIS, P.A.
1231 N. Calvert Street
Baltimore, MD 21202
(410) 752-8888

Attorney for Respondents Alban, Braeuninger, Engstrom, Grady, Howard, Jones, Schmitt, Skarpac, Townsend, Whittington, and O'Brien

GUY R. AYRES, III
AYRES, JENKINS, GORDY & ALMAND, P.A.
5200-B Coastal Highway
Ocean City, MD 21842
(410) 723-1400

Attorney for Respondents Mayor and City Council of Ocean City, Maryland, Powell, Massey, and Ocean City Police Department

BEST AVAILABLE COPY

6PD

The respondents respectfully request the Court to deny the petition for writ of certiorari for the reasons set forth herein.

The United States District Court for the District of Maryland was correct in granting summary judgment in favor of the police respondents on the issue of qualified immunity and the United States Court of Appeals for the Fourth Circuit was correct in affirming that decision because, under the facts of the case, the officers' use of force was objectively reasonable. The force used was in increments, consistent with the decedent's failure to comply with reasonable orders, and commencing with verbal commands, followed by the use of pepper spray, and finally by the use of batons when the decedent's conduct posed a threat of imminent serious injuries to the officers and to others.

The respondent officers were confronted with a large (6'3" tall, weighing 262 lbs.) individual (who they later learned was a professional wrestler) who failed to comply with their verbal commands for him to lie on the floor so that the officers could take him into custody. At first refusing to do so, the decedent, at one point in time, did kneel and the officers were able to place one handcuff on each of his wrists, but before they were able to bring the cuffs completely behind the decedent's back, he physically threw both of the officers off his body and, at this point, was flailing his arms with open cuffs on each of his wrists in the direction of the officers, posing a clear and imminent danger of serious injury to the officers.

It was then that the officers escalated their use of force to the next level, that is, the use of pepper spray, but which had no effect on the decedent's conduct. Utilizing the next

level of force, the officers used their batons to strike the decedent in non-lethal areas of his body. Petitioners argue (Pet. App. 8) that their expert, Dr. Dix, opined that the wound to the top of the decedent's head was consistent with the decedent having been struck with an object, and then point to the statement of their other expert, Dr. Fyfe (Pet. App. 9), that the striking of the decedent in the head with an object would have been in violation of general accepted police standards. However, petitioners overlook the fact that there was no evidence that the officers struck the decedent in the head and the autopsy report reflected only abrasions and cuts but, more importantly, there was no indication that the wound to the head was lethal or represented the application of deadly force. In addition, the head wound was equally consistent with the decedent's action in striking his head against a vending machine.

Petitioners cite *Hope v. Pelzer*, 122 S. Ct. 2508 (2002), as authority for the non-applicability of qualified immunity at the summary judgment stage of a 42 U.S.C. § 1983 case. *Hope* involved the handcuffing of a prisoner to a hitching post. Consequently, it did not involve the Fourth Amendment but rather the Eighth and Fourteenth Amendments to the United States Constitution. In addition to that distinction, the Court noted that in light of binding Eleventh Circuit precedent (and an Alabama Department of Corrections Regulation regarding the use of a hitching post), a reasonable police officer would have known that to engage in that act would have been a clear violation of the prisoner's rights.

Petitioners also assert that the Ninth Circuit Case of *Deorle v. Rutherford*, 272 F.3d 1272 (2001), is in conflict with Fourth Circuit precedent. A reading of *Deorle*, however, reveals that petitioners' argument is misplaced.

Deorle dealt with an officer's use of a lead-filled beanbag and shooting the beanbag into the face of a suspect causing serious injury. However, in *Deorle*, the plaintiff was unarmed, had not attacked or touched anyone, had obeyed the instructions given to him by the officers, and was not warned that he would be shot if he physically crossed an undisclosed line arbitrarily selected by the officer. In addition, Deorle was physically compliant with all of the officer's instructions. In the instant case, the decedent was not compliant and, at one point in time, had one of the officers pinned against a door holding him by the front of his shirt. Likewise, in *Deorle*, and contrary to the instant case, Deorle posed no threat to the officer and, indeed, the officer had already predetermined that he would shoot Deorle if Deorle came within a certain range and did, in fact, shoot him having made a calculated and deliberate decision to shoot when Deorle reached the particular point the officer had designated in his own mind. The decision in *Deorle* is not inconsistent with the objective use of reasonable force in the circumstances of the instant case.

In short, the use of force in the instant case by the officer respondents was consistent with and not in violation of the Fourth Amendment or of the decision of this Court as set forth in *Grahm v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989).

Having determined that there was no constitutional violation and that the officers were entitled to qualified immunity, then the City, Mayor, Police Chief and police department as the employer and policymakers of the officers, cannot be held liable. *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986).

CONCLUSION

Applying the applicable principles of law to the facts of this case, the officers' conduct was objectively reasonable, and a reasonable police officer could have believed that such actions were justifiably permissible. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The officers were confronted with bizarre and unusual behavior with a person of unusual size and strength who could not be controlled either physically, through the use of pepper spray or even by the use of batons. They were confronted with an individual who had an open, dangling handcuff on each wrist and was swinging his arms about in an aggressive manner toward the officers causing them to be placed in imminent danger of serious injury. Once the decedent was subdued, no other force was used.

For all of the above reasons, respondents respectfully request that the writ be denied.

Respectfully submitted,

ROBERT C. VERDERAIME
Counsel of Record
VERDERAIME & DUBOIS, P.A.
1231 N. Calvert Street
Baltimore, MD 21202
(410) 752-8888

Attorney for Respondents
Alban, Braeuninger, Engstrom,
Grady, Howard, Jones, Schmitt,
Skarpac, Townsend, Whittington,
and O'Brien

GUY R. AYRES, III
AYRES, JENKINS, GORDY
& ALMAND, P.A.
5200-B Coastal Highway
Ocean City, MD 21842
(410) 723-1400

Attorney for Respondents Mayor and City Council of Ocean City, Maryland, Powell, Massey, and Ocean City Police Department